

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES MICHAEL LICHTENBERGER**

Claimant

VS.

**AIR CAPITAL VENDING**

Respondent

AND

**ASSURANCE COMPANY OF AMERICA**

Insurance Carrier

Docket No. 1,012,933

**ORDER**

Respondent appeals the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated April 9, 2004. Claimant was awarded benefits for injuries suffered from January 1, 2003, to February 13, 2003, to his right hip, low back and right leg.

**ISSUES**

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment? Respondent contends that claimant had ongoing preexisting problems to his low back and right leg, having undergone chiropractic treatment for several months prior to beginning work with respondent. Claimant, however, contends that his condition prior to his work with respondent was minor, with a significant worsening during the alleged date of accident period.
- (2) Did claimant provide timely notice of accident? Respondent contends claimant failed to advise any of its employees of any work-related connection to his ongoing back complaints. Additionally, respondent argues claimant failed to advise his chiropractor, Michael Mitchael, D.C., of Dopps Chiropractic, of any work-related connection to his physical complaints.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds as follows:

Claimant alleges accidental injury to his low back, right hip and right leg from January 1, 2003, through February 13, 2003 (his last day worked). Claimant testified that the lifting, bending and twisting on a regular basis, including the daily use of pallet jacks, aggravated his condition. While claimant acknowledged he had undergone chiropractic treatment prior to his employment with respondent, claimant argued that his condition during the injury period in question significantly worsened, causing his treatment to become more regular as the pain symptoms increased.

Claimant identified three of respondent's employees as persons with whom he discussed his ongoing problems and their work-related connection. Gordon Long was claimant's first line supervisor. Brian Osborne was the operations manager, directly under the owner. And Kent Criser was the president and owner of the company. Two of the three, Mr. Long and Mr. Criser, testified that claimant failed to advise them at any time that he suffered accidental injury arising out of and in the course of his employment. Both emphatically denied being aware of any work-related connection to claimant's complaints before a September 11, 2003 letter was received from claimant's attorney. Mr. Long, who was the manager of the service department and warehouse, while initially somewhat vague as to claimant's identity, once his memory was refreshed, testified that claimant never advised him of any work-related connection with his back pain or any other pain. He identified claimant as somewhat of a complainer. Mr. Long also testified that he had a very strict policy about work-related injuries. Injuries, when reported, resulted in the immediate creation of an accident report and a referral to the Wesley Occupational Health and Safety building. He testified he was unaware of claimant having any work-related back complaints at any time while claimant worked under his immediate supervision.

Claimant worked through February 13, 2003. On that day, claimant left early, without accomplishing certain job tasks that had been assigned to him. The next day (February 14, 2003), claimant was terminated for failing to perform his work duties. Claimant testified that at the time of his termination, he spoke to Mr. Osborne about his ongoing back complaints and their relation to his employment with respondent. Mr. Osborne, however, did not testify in this matter.

Claimant was receiving chiropractic treatment under the direction of Michael Mitchael, D.C., at Dopps Chiropractic in Wichita, Kansas. Records placed into evidence at the time of the March 11, 2004 preliminary hearing, show that claimant was undergoing regular chiropractic treatments prior to his employment with respondent. However, claimant testified he only received these chiropractic adjustments approximately once per

month, which he described as being a “tune up.” However, a review of the medical records from Dr. Mitchael indicates that claimant was being treated anywhere from one to four times a month on a fairly regular basis prior to his alleged injury with respondent. It is noted, however, beginning in January of 2003, the numbers of adjustments claimant required increased substantially, with claimant going to Dr. Mitchael eight times in January 2003, four times in February 2003, eight times in March 2003 and eight times in April 2003. This does indicate an increase in the number of adjustments being provided to claimant during this period.

In workers’ compensation litigation, it is claimant’s burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.<sup>2</sup>

It is well established under the Workers Compensation Act in Kansas that when a worker’s job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>3</sup>

In this instance, claimant alleges accidental injury to his low back, right hip and right leg stemming from the bending, stooping, twisting, lifting and handling of pallet jacks on a regular basis for respondent. While there is some dispute presented regarding the physical activities associated with handling the pallet jack, there is little dispute that claimant, on a regular basis, lifted up to 50 pounds with significant bending and stooping associated with his job. The Board finds based upon a preponderance of the evidence that claimant has proven that he suffered an aggravation to his low back, right leg and right hip as a result of the physical activities associated with his job during the period January 1, 2003, through February 13, 2003.

K.S.A. 44-520 requires that notice of accident be provided to the employer within ten days of the date of accident, with the notice stating the time, place and particulars associated with the accident. Claimant alleges that he provided notice to several of

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

<sup>2</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

<sup>3</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

respondent's employees. Claimant testified that he discussed the situation with Brian Osborne, the operations manager. Mr. Osborne was unable to be located and did not testify in this matter on behalf of either party. However, both Mr. Long and Mr. Criser testified, contradicting claimant's contentions that he provided respondent with notice of the alleged accident.

When dealing with credibility questions associated with the testimony of conflicting witnesses, the Board will generally give some deference to the Administrative Law Judge's opportunity to observe the witnesses' live testimony. However, in this instance, the only witness to testify before the ALJ was claimant, and even his testimony is somewhat suspect, as claimant's testimony at preliminary hearing is contradicted not only by the testimony of Mr. Long and Mr. Criser, but also by certain medical records contained in the record. Specifically, the chiropractic notes of Dr. Mitchael, which, while indicating claimant was suffering from low back problems with radiculopathy into his right leg, failed to mention any work-related connection to those complaints. In fact, the case history in Dr. Mitchael's office note of November 13, 2002, indicates that claimant has been experiencing low back pain for approximately one year. On that form, regarding the question of how the problems occurred, it was noted there was an "insidious onset" and "woke up in pain."

It is also significant that claimant failed to request medical treatment from respondent for this condition for seven months after his termination. Claimant testified that he feared that he would lose his job if he filed a workers' compensation claim. However, that excuse ceased to have merit when claimant was terminated on February 14, 2003, for failure to perform his job duties.

Were this merely a question of the credibility of claimant's testimony versus the credibility of witnesses for respondent, the Board would give deference to the Administrative Law Judge's credibility determination. However, in this instance, the failure of claimant to advise his chiropractor at any time of a work-related connection to his complaints casts significant doubt on claimant's testimony that he provided notice of accident in a timely fashion as required by K.S.A. 44-520. The Board finds that claimant failed to prove that he provided timely notice of accident as required by K.S.A. 44-520, and the Order of the Administrative Law Judge is reversed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 9, 2004, should be, and is hereby, reversed, and claimant is denied benefits for the accidental injury alleged from January 1, 2003, through February 13, 2003, while employed with respondent.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2004.

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BOARD MEMBER

c:     John L. Carmichael, Attorney for Claimant  
       Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier  
       Nelsonna Potts Barnes, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director